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Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE VERMONT, CALIFORNIA, CONNECTICUT, MAINE, MASSACHUSETTS, MICHIGAN, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OREGON, RHODE ISLAND, WISCONSIN, AND THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

The amici States,[1] who share responsibility for enforcing the Clean Air Act with the federal Environmental Protection Agency (EPA), have two important interests in the outcome of this case.

First, the amici, like all states, have a fundamental interest in protecting the health and welfare of their citizens. In the view of the amici States, EPA's authority to enforce the Clean Air Act is critical to attaining our national goal of reducing and preventing air pollution.

Second, the amici have a specific interest in supporting EPA's authority to enforce the Best Available Control Technology (BACT) provision of the Act's Prevention of Significant Deterioration of Air Quality (PSD) program. Although the Act gives States primary responsibility to determine BACT for new major stationary sources, the amici States agree with the United States that EPA should and does have limited oversight authority with respect to BACT determinations.

While it may seem counterintuitive for States to take a position in support of federal authority, amici States are specifically concerned about the BACT requirement. The amici States agree with the petitioner State of Alaska – and Alaska's amici – that States bear primary responsibility for achieving

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1 The Pennsylvania Department of Environmental Protection received written consent from the parties to join this brief. The letters of consent have been filed with the Court. This brief was not written, in whole or in part, by counsel for a party. No person or entity, other than amici, made a monetary contribution to the preparation or submission of this brief.

the goals of the Clean Air Act. In the PSD program, States have discretion to make BACT determinations and, as Alaska correctly argues, EPA cannot "second guess" a State's reasonably justified decision merely because EPA would reach a different conclusion.

Nonetheless, the amici States view EPA's limited oversight role, as recognized by the Ninth Circuit in this case, as a necessary part of the cooperative federalism embodied in the Clean Air Act. A State's discretion to reach a BACT determination is not unbounded; the permitting authority must apply the statutory criteria and must present a reasoned justification for its decision. The existence and enforcement of the BACT requirement *nationwide* protects the interest of States by removing the incentive for industry to "shop around" for a more lenient permitting process.

Federal oversight thus provides a necessary backstop and contributes to consistent application of the Act. EPA rarely questions State BACT determinations, but its ability to do so in narrow circumstances serves the interest of all States by assuring that each State carries out its obligations under the Act.

STATEMENT OF THE CASE

Congress enacted the Clean Air Act as a partnership between state and federal governments. The centerpiece of the Act is found in sections 108 through 110 of the Act, under which EPA sets nationally applicable ambient air quality standards. *See* 42 U.S.C. §§ 7408-7410. States may then

develop and implement plans for achieving and maintaining air quality that meets those standards. In addition, Congress enacted other nationwide programs that must be implemented in each State, regardless of the air quality in the State.

The Prevention of Significant Deterioration of Air Quality (PSD) program is one such program. These provisions regulate air pollution in certain areas, known as "attainment" areas, where air quality meets or is cleaner than the national ambient air quality standards ("NAAQS"), as well as in unclassifiable areas. 42 U.S.C. §§ 7470-7479.

The PSD provisions are implemented by a regulatory process that requires pre-construction permits for new major stationary sources, such as the facility in this case. *See* 42 U.S.C. §§ 7475, 7479(1). States that issue PSD permits (1) must determine that the permitted source would neither exceed the allowable increments for the area nor cause a violation of the applicable NAAQS;[2] and (2) must require that the facility be "subject to the best available control technology" for each pollutant regulated under the Act. 42 U.S.C. § 7475(a)(4).

The BACT requirement is one of the principal substantive requirements of the PSD program. *See Alabama Power v. Costle*, 636 F.2d 323, 407 (D.C. Cir. 1980). All new sources located in an attainment area in a given State must comply with BACT regardless of the other strategies that the

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2 The requirement that a State cannot exceed its PSD allowable increments is a distinct requirement of the PSD program and is not at issue in this case. 42 U.S.C. § 7476.

State may have in place under section 110 to maintain compliance with each NAAQS. The term BACT is defined in the Act (and similarly by the State of Alaska) as follows:

> "[B]est available control technology" means an emission limitation based on the *maximum degree of reduction* of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility ***.

42 U.S.C. § 7479(3) (emphasis added); *accord* Alaska Admin. Code tit. 18, § 50.990(13) (defining BACT as "the emission limitation that represents the maximum reduction achievable for each regulated air contaminant, taking into account energy, environmental and economic impacts, and other costs").

As the definition demonstrates, a permitting authority must analyze, evaluate and present a reasoned justification for its BACT determination before it issues a permit for a specific source. *Id.*; *see* Alaska Admin. Code tit. 18, § 50.310(d)(3) (Alaska's PSD regulations require "a demonstration that the proposed limitation represents the best available control technology for each air contaminant and for each new or modified source"); *see also* Pet. App. at 3a. Indeed, one of the explicit

Congressional purposes of the PSD program is that permitting decisions are made "only after careful evaluation." 42 U.S.C. § 7470(5).

The Act also gives EPA enforcement authority. Section 113 of the Act regulates federal enforcement of the Act's requirements, and section 167 provides for federal and state enforcement of the PSD provisions. *See* 42 U.S.C. §§ 7413, 7477.

Section 167 requires EPA to "take such measures" when it is "necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part." 42 U.S.C. § 7477. Section 113 authorizes EPA to "issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies" or "issue an administrative penalty order" to a State that "is not acting in compliance with any requirement or prohibition" of the PSD provisions. *Id.* § 7413(a)(5).

In this case, EPA used its limited authority to address a violation of the BACT requirement. Pet. App. at 7a. EPA issued three enforcement orders to the Alaska Department of Environmental Conservation ("Alaska") and Cominco Alaska Incorporated ("Cominco"). *Id.* at 2a. These orders effectively invalidated the PSD permit issued to Cominco by Alaska for failure to comply with the BACT requirement of the Act. *Id.* Alaska and Cominco petitioned the Court of Appeals for the Ninth Circuit for review of the orders. *Id.* at 6a. Both Alaska and Cominco claimed that the EPA exceeded its authority by issuing the enforcement

orders and that Alaska acted within its discretion when making its BACT determination. *Id.*

The Ninth Circuit rejected these arguments and found that EPA had properly exercised its enforcement authority. Pet. App. at 7a. In reaching its decision, the court found that sections 113 and 167 apply to the BACT requirement. *Id.* at 9a (holding that subjecting a facility to BACT is a "requirement" under both section 113(a)(5) and section 167). It next found that these enforcement sections grant EPA the authority to ensure that States present a reasoned justification for their BACT determinations. *Id.* at 10a-11a. The Ninth Circuit sustained EPA's enforcement orders, finding that the record supported EPA's conclusion that Alaska failed to justify its BACT determination. *Id.*

INTRODUCTION AND SUMMARY OF ARGUMENT

The "States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). As part of this "system of shared federal and state responsibility," the Clean Air Act grants to States the primary authority to determine BACT. Pet. App. at 3a; 42 U.S.C. § 7479(3). However, States were not delegated the *exclusive* role and do not have *absolute* discretion in making BACT determinations. As the federal agency that enforces the Act, EPA has limited authority to ensure that a State provides a reasoned justification for its BACT determination. EPA's oversight promotes the important goals of the Clean Air Act and does so without disrupting or burdening the

State permitting process.

When it created the BACT requirement, Congress sought to balance the significant discretion that States would need to implement the PSD program with the necessary federal oversight that would be required to fulfill the program's goals. Federal oversight of the BACT requirement serves three important goals of the Act.

First, Congress recognized that States should not have to choose between maintaining a high level of air quality and promoting industrial development within their borders. EPA's authority ensures a reasonable level of consistency among BACT determinations nationwide. Consistent application of the Act promotes economic development in an even manner throughout the country without unduly interfering with States' authority under section 110 to determine how best to protect their air quality.

Second, technological advancements are basic to any effective program of pollution control that both stimulates economic growth and protects air quality. The technology-forcing goals of the BACT provisions can only be attained, however, if States make BACT determinations in a reasoned manner. EPA's limited enforcement authority ensures that States will fulfill this obligation.

Third, air pollution does not respect State boundaries. Without proper implementation of the BACT requirement, States that desire to retain clean air will have little hope of doing so. Federal enforcement of the BACT requirement protects

States and their citizens from regional increases in air pollution caused by unsupported BACT determinations.

EPA's limited oversight of the BACT requirement promotes these goals without disrupting the State permitting process. EPA's action does not alter the relationship that States have always had with the federal government with respect to BACT determinations. Notwithstanding EPA's ability to oversee BACT decisions, States retain primary authority to determine BACT for new pollution sources and have broad discretion and flexibility to do so. Alaska and its amici overstate the consequences that accompany EPA's infrequent use of its limited oversight authority. States will continue issuing permits, as they have over the past two decades, with EPA playing a limited, but critically important, oversight role.

ARGUMENT

I. LIMITED EPA OVERSIGHT AUTHORITY OF THE BACT REQUIREMENT ENSURES THAT THE GOALS OF THE PSD PROGRAM ARE FULFILLED

The Clean Air Act establishes a comprehensive program for controlling and improving the nation's air quality in which the "States and the Federal Government [are] partners." *General Motors Corp. v. United States*, 496 U.S. at 532. Congress has been attentive to the delicate federal-state balance of the Act, and its design of the PSD program is no exception. Despite granting States "broad flexibility" in making BACT decisions, Congress

provided "the parameters for that decision" in the text of the Act. S. Rep. No. 95-127, at 31 (1977). Congress directed that a new source be required to achieve the maximum degree of reduction of pollutants emitted from the source that is "achievable." *See* 42 U.S.C. § 7479. In making this determination, States must "take into account energy, environmental, and economic impacts and other costs of the application of BACT." S. Rep. 95-127, at 31; *see* 42 U.S.C. § 7479.

Congress recognized that these "[n]ational guidelines on prevention of significant deterioration [such as BACT] are essential to guarantee the individual States the right to decide to maintain air quality superior to minimum Federal standards." H.R. Report No. 95-294, at 136 (1977). Therefore, it necessarily follows that Congress contemplated that EPA would have the authority to ensure compliance with those guidelines. When Congress created the BACT requirement, it sought to balance the significant discretion that States would need to implement the program with the necessary federal oversight that would be required to fulfill the program's goals.

This necessary federal oversight is limited. Congress relegated EPA to a "sharply restricted role" in the program whereby its role would essentially be "one of monitoring State actions." S. Rep. 95-127, at 12, 36. EPA, however, "could go to court to stop a permit for activities which would exceed the increment of pollution or which otherwise did not comply with the requirements of this section, *including the use of best available control*

technology." S. Rep. 95-127, at 12 (emphasis added).

The limited oversight authority granted to EPA serves the goals of the PSD program and is consistent with the purpose of requiring BACT. Requiring new sources to install the best available control technology: (1) promotes consistent application that protects States' environmental and economic interests; (2) promotes the technology-forcing design of the PSD program; and (3) minimizes trans-boundary air pollution problems. To achieve these goals, Congress gave EPA the authority to correct a BACT determination when a State permitting authority fails to provide a reasoned justification for its decision.

A. Federal Enforcement Of The BACT Requirement Promotes Consistent Application That Protects States' Environmental And Economic Interests

Congress recognized that States should not have to choose between maintaining a high level of air quality and promoting industrial development within their borders. Accordingly, it designed the PSD program to ensure that "economic growth will occur in a manner consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). Although Congress charged States with making the determination of what is BACT for a given application, Congress did not intend for BACT determinations to vary widely from State to State with no federal mechanism to correct unreasoned or wholly inconsistent determinations. EPA's limited authority to enforce the BACT requirement serves to

maintain a reasonable level of consistency among States, which, in turn, ensures even economic development across the country.

The BACT requirement, like the other PSD provisions, is "an equalizer, enabling all areas of the country to join in the fight for clean air without fighting each other." H.R. Rep. 95-294, at 134. The promotion of economic growth throughout the country without prejudice to certain States is a compelling reason that supports EPA's limited oversight of BACT determinations.

Without EPA oversight of the PSD guidelines, such as the BACT requirement, "the very States demonstrating a concern for preserving existing clean air seriously risk having their economic base undermined." H.R. Rep. 95-294, at 135. States that make more stringent BACT determinations would find themselves at a "substantial competitive disadvantage" with other States because of the "strong incentive for industry to 'shop around' for States or localities with large clean air resources and weak pollution control standards." *Id.* at 133.

In fact, States that wish to maintain a high level of air quality by requiring the most effective controls could face a "double threat." H.R. Rep. 95-294, at 134. Not only would they lose existing industrial plants to more permissive States but, in addition, they "will likely become the target of 'economic-environmental blackmail' from new industrial plants that will play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls." *Id.*

Although the facts in this case do not suggest that "economic-environmental blackmail" occurred, these concerns exist in other parts of the country. Of course, Cominco cannot move its facility elsewhere if it is dissatisfied with Alaska's permitting decisions. However, many, if not most, of the new sources subject to the PSD provisions have a great deal more flexibility in deciding where to locate. In order to attract new industrial facilities, such as automobile assembly facilities or computer manufacturing plants, States commonly offer economic incentives. Without the backstop provided by federal oversight of the PSD provisions, including the BACT requirement, States could feel pressure to apply the PSD requirements leniently in order to compete with other States for new facilities.

If EPA has authority to ensure a reasonable level of consistency among BACT determinations nationwide, then every State can feel more confident about maintaining stringent standards without fear of losing its current industry or alienating prospective industry. Such an atmosphere will promote economic development in a more even manner throughout the country while maintaining air quality.

B. Limited EPA Oversight Promotes The Technology-Forcing Goals Of The PSD Program

The relevant legislative history demonstrates that Congress gave States discretion to determine BACT on a case-by-case basis as a way of accomplishing the technology-forcing goals of the Act. Contrary to the arguments made by Alaska, Congress was not

motivated solely by concerns for state autonomy when it gave States broad discretion to make BACT determinations.

Technological advancements are "basic to any effective program of pollution control" that both stimulates economic growth and protects air quality. S. Rep. 95-127, at 17. This is embodied in a Senate report of the 1977 Amendments, which describes the "philosophy of encouragement of technology development" fostered by the Act. *Id.* at 18. The desire to promote technological innovation in the PSD program was therefore of paramount concern to Congress. EPA's limited oversight authority ensures that State BACT determinations promote this goal.

By enacting the 1977 Amendments, Congress specifically sought "to induce, to stimulate, and to augment the innovative character of industry in reaching for more effective, less-costly systems to control air pollution." S. Rep. 95-127, at 18. However, the goal of developing more effective and less expensive ways to control air pollution was not the only motivation behind Congress's intent to promote advances in technology in the PSD program. Congress recognized the broader notion that "[t]echnological improvements have enabled this Nation to establish the greatest industrial plants in the world, providing American workers with the highest pay and best working conditions, in return for high productivity." S. Rep. 95-127, at 17. Accordingly, Congress structured the 1977 Amendments to foster the national goal of

promoting technological advancement whenever possible.

Of all the provisions in the Amendments that affect technology, the PSD provisions are "[p]ossibly the most important." S. Rep. 95-127, at 18. The goal of promoting technology was precisely the reason that Congress did not specify control devices for new sources in the PSD program. States are not forced to assign pre-determined control measures but, rather, can encourage the development of new technology when appropriate. As a Senate report acknowledges, giving States the ability to determine BACT on a case-by-case basis "allows the adoption of improvements in technology to become widespread far more rapidly than would occur with a uniform Federal standard [of BACT]." *Id.* at 31.

The technology-forcing goals of the BACT provisions can only be attained, however, if States make BACT determinations in a reasoned manner, consistent with the statutory requirements. If States have unreviewable, unfettered discretion to decide on BACT, States may be pressured to avoid making permitting decisions that require and promote technological innovation, as intended by Congress. EPA's limited oversight authority ensures that States determine BACT in a reasoned manner, and thus carry out Congress's intent to foster new and better technologies for pollution control.

C. The BACT Requirement Helps Minimize Trans-boundary Air Pollution Problems

The problem of interstate air pollution transport has been of concern throughout the past three

decades. The reason is simple: "Air is no respecter of political boundaries; a community that sets and enforces strict standards may still find its air polluted from sources in another community or another State." President's Message on the Environment, February 10, 1970, 116 Cong.Rec. 32909. Although BACT is determined by the permitting States, other States will be affected by the emissions from a new source. Congress expressed this concern explicitly in section 160 of the Act. *See* 42 U.S.C. § 7470(4) (Congressional purpose of the PSD program includes assuring that "emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State").

In part, this is why Congress enacted the PSD provisions. It sought to create a "policy of prevention of significant deterioration which controls a new source's emissions to the maximum extent practicable [to] help minimize the transport and buildup of pollutants from one area to another." H.R. Rep. 95-294, at 135. Congress recognized that "without national guidance on prevention of significant deterioration and protection for States exercising their right to maintain clean air, that right will be meaningless." *Id.* at 136.

Without proper implementation of the PSD provisions, including EPA's authority to ensure that BACT determinations are carefully evaluated, "those States which desire to retain clean air will have little hope of maintaining superior air quality." H.R. Rep. 95-294, at 136. This is because, "while emissions

may not be 'significant' in the area of origin, when transported to another area and combined with pollutants from other areas, air quality may be drastically degraded." *Id.*

To be sure, the PSD provisions were not created to "stand alone" as the sole mechanism to mitigate interstate transport of air pollution. They work in conjunction with other sections of the Act, such as sections 116 and 126.[3] *See, e.g.*, 42 U.S.C. §§ 7416, 7426. It is clear, though, that requiring sources to use the best available control technology, by itself, will reduce "emissions for each new source" and minimize "the impact on limited air resources." H.R. Rep. 95-294, at 135.

To achieve the critical goal of reducing interstate transport of pollutants, EPA must be able to review and correct BACT determinations that are not supported by a reasoned justification. All States must make consistent and reasoned BACT determinations. Federal enforcement assures that each State will, in fact, make BACT determinations in this manner, thereby protecting States and their citizens from regional increases in air pollution caused by unsupported BACT determinations.

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3 Section 116, with limited exceptions, allows States to adopt and enforce "any standard or limitation respecting emissions of air pollutants or [] any requirement respecting control or abatement or air pollution," so long as it is more stringent than an existing standard. 42 U.S.C. § 7416. Section 126 allows States to petition EPA for a finding that "any major source" is emitting or will emit prohibited air pollutants. Id. § 7426.

II. EPA'S LIMITED OVERSIGHT ROLE DOES NOT DISRUPT THE STATE PERMITTING PROCESS

Alaska and its amici overstate the possibility that EPA oversight will disrupt or undermine the State permitting process, for three reasons: (1) EPA oversight of BACT determinations is nothing new; EPA has consistently claimed this authority and has rarely exercised it; (2) State processes will not become superfluous, as States still bear primary responsibility for determining BACT; and (3) the suggestion that EPA will abuse its enforcement power and will invalidate permits "years" later is unfounded.

First, there is nothing remarkable about EPA's limited authority to enforce the BACT requirement. EPA's assertion of authority in this case does not represent or indicate an alteration in the relationship that States have always had with EPA with respect to BACT determinations. EPA has for years consistently maintained that BACT determinations involve "the exercise of judgment," but require correction by EPA when the decision is "not based on a reasonable analysis." Memorandum from Michael S. Alushin, EPA Associate Enforcement Counsel for Air (July 15, 1988) (JA 273-74). If anything, the attention directed at this case only illustrates how rarely EPA exercises this authority. States will continue issuing permits, as they have over the past two decades, with EPA playing a limited, but critically important, oversight role.

Second, EPA's limited oversight role does not make State permit processes superfluous. States unquestionably still bear primary responsibility for determining BACT. EPA appropriately recognizes that a State must only make a "legally supportable" BACT determination– one that provides a "reasoned justification for its selection of BACT." Pet. App. at 13a-14a. As the United States has represented to this Court, EPA's authority extends to "those rare occasions where a permitting authority acts outside the bounds of its discretion." Brief for Respondents in Opposition at 6.

Most States, including Alaska, already have in place regulations that require precisely the kind of reasoned BACT determination that would foreclose EPA intervention. *See, e.g.*, Alaska Admin. Code tit. 18, § 50.310(d)(3) (requiring "a demonstration that the proposed limitation represents the best available control technology for each air contaminant for each new or modified source"); *see also* ME ADC 06-096 Ch. 115, § 4 (requiring that the "applicant must demonstrate that each emissions unit to be constructed, reconstructed or modified will receive BACT"). Therefore, EPA simply does not routinely step in and correct State BACT determinations.

Because EPA's ability to oversee BACT decisions is very narrow, Alaska's claim that EPA will be able to "veto" a State's BACT determination, rendering the State permitting process superfluous, is unfounded. Notwithstanding EPA's limited oversight authority, States still have the primary authority to determine BACT for new pollution sources, and have broad

discretion in making their decision. Given the limited nature of EPA's role, Alaska and its amici are incorrect to suggest that permit applicants will bypass the State process and negotiate directly with EPA.

Third, Alaska's fear concerning EPA's ability to challenge permits in the "months, even years, after a permit has been issued" is misplaced. *See* Pet. Brief at 35. The facts in this case demonstrate that EPA objected to Alaska and Cominco well before the permit was issued. Alaska also discounts the fact that EPA's enforcement against a State or a source is subject to judicial review. The federal courts are well suited to provide meaningful review to States and sources that contest actions taken by EPA. *See* 42 U.S.C. § 7413(b) (for an action brought by EPA in district court to enforce an order); 42 U.S.C. § 7607(b)(1) (for a petition for review filed with the court of appeals). Furthermore, a court under a different scenario could scrutinize whether EPA's failure to challenge a permit within a reasonable time period should preclude EPA's action. *See U.S. v. AM General Corp.*, 808 F.Supp. 1353, 1367 (N.D. Ind. 1992), *aff'd*, 34 F.3d 472 (7th Cir. 1994) (finding that EPA could not enforce against a source for modifying its facility pursuant to an invalid permit because EPA did not act until after the source had begun operations under the terms of that permit).

In sum, when States fail to present reasoned justifications for their BACT decisions, federal enforcement does nothing more than provide the necessary "backstop" to ensure that those States

do not abuse the discretion that Congress afforded to them. Alaska and its amici inflate the consequences that accompany EPA's infrequent use of its limited oversight authority.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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